

## REMARKS

This application has been reviewed in light of the Office Action dated January 31, 2006. Claims 1-24 are presented for examination, of which Claims 1, 8, 13, and 18 are in independent form. Claims 1-24 have been amended to define Applicants' invention more clearly, but have not been narrowed for reasons relating to prior art. Favorable reconsideration is requested.

The Office Action states that Claims 1, 8, 13, and 18 are objected to because of the informalities noted on page 3. Although Applicants do not concede the propriety of the objections, in an effort to advance the prosecution of this application these claims have been amended in accordance with the suggestion on page 3 of the Office Action. Therefore, withdrawal of the objections is respectfully requested.

The Office Action states that Claims 1, 8, 13, and 18, as well as their dependent claims, are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. In particular, the Office Action states that "it is unclear what Applicant means by 'same type' or whether or not 'same type' indicates --products of the same color--, --products of same shape--, etc." Although Applicants do not concede the propriety of the rejections, in an effort to advance the prosecution of this application Claims 1, 8, 13, and 18 have been amended to remove the phrase "same type" therefrom. Applicants believe that the claims are sufficiently definite under 35 U.S.C. § 112, second paragraph, and therefore withdrawal of the rejections is respectfully requested.

The Office Action states that Claims 1-24 are rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,443,843 (Walker et al.); and that Claims 1, 3, 5-8, 10-13, 15-18, 20, and 22-24 are rejected under § 102(b) as being anticipated by U.S. Patent No.

5,585,369 (Lieberman). Applicants respectfully traverse these prior-art rejections, and submit that independent Claims 1, 8, 13, and 18, together with the claims dependent therefrom, are patentably distinct from the cited prior art for at least the following reasons.

Claim 1 sets forth an aspect of the present invention directed to a method of administering a promotional contest. One of the purposes of the contest is to encourage consumers to purchase items produced by a manufacturer. According to the method, a subset of a plurality of items produced by the manufacturer is established, and each item of the subset includes a winning code unique to the subset.<sup>1</sup> An item with a contest code is provided to a consumer, and the contest code is inputted into a prize redemption system by the consumer. The contest code is validated, and a determination is made as to whether the contest code matches the winning code thus entitling the consumer to receive a prize associated with the winning code.

As mentioned above, one of the purposes of the contest is to encourage consumers to purchase items produced by the manufacturer. For example, if the manufacturer wants to promote the purchase of its product “Shampoo A,” the manufacturer may choose to include a winning code in or on the packaging of one or more bottles of Shampoo A. In another example, if the manufacturer wants to promote the purchase of its product “Soap B” in addition to Shampoo A, the manufacturer may choose to include a winning code in or on the packaging of one or more bars of Soap B or one or more bottles of Shampoo A.<sup>2</sup> Bars of Soap B and bottles of Shampoo A are provided with contest codes in or on the packaging. A consumer who purchases a bar of Soap B can determine whether the contest code in or on the packaging of the

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<sup>1</sup> Of course, the invention of Claim 1 is not limited to one subset of the plurality of items, but may include multiple subsets of the plurality of items, such as, for example, subsets for a grand prize, second prize, third prize, and the like.

<sup>2</sup> The examples provided herein are intended to illustrate some of the aspects of the present invention. It should not be construed that the present invention is limited to or by any details discussed in connection with the illustrative examples.

bar of Soap B is a winning code by inputting the contest code into a prize redemption system, which electronically determines whether the inputted contest code is a valid contest code, and which also determines whether the inputted contest code matches a winning code thus entitling the consumer to a prize.

Walker et al. relates to a system that awards a product to a customer if the customer pays a fee to play a game and then wins the game. If the customer loses the game, then a portion of the fee is credited to the customer. (See the Abstract.) Apparently, Walker et al. teaches that the customer interacts with a Web site to shop for one or more products. When the customer selects a desired product, a Web server controlling the Web site displays a Web page that gives the customer the option of playing a game to win the desired product. The game requires the customer to pay a fee. If the customer opts to play the game, the Web server charges the fee to the customer and provides the game to the customer. If the customer wins the game, the product is shipped to the customer at no further cost. On the other hand, if the customer loses the game, the customer is informed that the fee for playing the game can be credited towards the purchase of the product, although no purchase of the product is required after the game is played. (See column 4, lines 6-32.)

Nothing has been found in Walker et al. that is believed to teach or suggest any of the following steps of Claim 1:

(1) establishing a subset of a plurality of items produced by a manufacturer, wherein each item of the subset includes a winning code unique to the subset;

(2) providing to a consumer an item from the plurality of items, wherein the item includes a contest code;

(3) enabling the consumer to input the contest code into a prize redemption system;

(4) validating the contest code; and

(5) determining whether the contest code inputted by the consumer matches the winning code thus entitling the consumer to receive a prize associated with the winning code.

In regard to step (1) of Claim 1, the Walker et al. system allows a customer to play a game to try to win a desired product. That is, the customer would like to own the product but *does not yet have the product*. The game does not involve a winning code included in “a subset of a plurality of items produced by a manufacturer,” as in Claim 1. In fact, the prize for winning the game is the product itself, which would negate the promotional effect of having the customer obtain the product first (as in Claim 1) and then find out whether the product includes a winning code. According to Walker et al., the customer could choose not to purchase the product after playing the game and losing.

In regard to step (2) of Claim 1, Walker et al. fails to even suggest providing the customer with an item that includes a contest code. As discussed above, according to Walker et al., the prize for winning the game is the product itself, which would *teach away* from having the customer obtain the product with the contest code first. Again, according to Walker et al., the customer would like to own the product but does not yet have the product, and the Walker et al. system lets the customer try to win the product by playing the game. Applicants note that Fig. 6 of Walker et al. shows a table representing product information for a variety of products. However, nothing in Walker et al. is seen to disclose or suggest that such product information includes a contest code.

The assertion by the Examiner, in the Office Action and in discussions with Applicants' representatives, is that a UPC number on a product could somehow be the contest code. Applicants respectfully disagree. As explained in the enclosed Declarations of Robert M. Friedman (Exhibit A) and Douglas J. Timbie (Exhibit B), each product produced by a manufacturer and offered for sale is labeled with a unique UPC symbol consisting of a barcode and a number. All identical items or units of the same product are labeled with the same UPC symbol. Therefore, if the contest code were to be the number from the UPC symbol, as suggested by the Examiner, then either every entry would win or every entry would lose. Clearly no organization would want to run such a contest! Further, labeling two identical items or units of the same product with different UPC symbols would be *improper* and would go against the UPC labeling convention established by the Uniform Code Council, Inc.®, as discussed in the enclosed Declaration of Douglas J. Timbie (Exhibit B).

In the Response To Applicant's Arguments portion of the Office Action, on page 9, the Examiner states: "Applicant further argues that it would not be possible to use a conventional UPC code, as taught by Walker, as an ID code since a UPC code identifies a product and since the same UPC code is typically used across multiple units of the same product. The Examiner completely and respectfully disagrees with the Applicant's findings." Applicants respectfully urge the Examiner to study the products on the shelves of any supermarket, any convenience store, and any drug store to see that all identical items of a product do have the same UPC symbol, *i.e.*, the same barcode and the same series of numbers associated with the barcode. For the Examiner's convenience, see: Exhibit C, which shows a copy of the labels from two identical cans of B&M® baked beans, each label having *the same UPC symbol*; Exhibit D, which shows a copy of the labels from two identical cans of Dole® pineapple chunks,

each label having *the same UPC symbol*; and Exhibit E, which shows a copy of the labels from two identical cans of Progresso® Chickarina® soup, each label having *the same UPC symbol*.

The Office Action, on page 10, states that “contrary to the Applicant’s conclusion, a UPC code or identifier associated with a product uniquely identifies the product from a particular manufacturer. For example, a typical UPC code, in the form of a bar code and human readable code or number, has at least two fields A and B comprising five digits each. The first field A represents the manufacturer of a product and the second field uniquely identifies the product related to the manufacturer. This aspect is very well documented in the art.” It is respectfully submitted that Applicants have never indicated that a UPC symbol does not uniquely identify a product. Instead, Applicants have maintained and continue to maintain that while a UPC symbol uniquely identifies a product, *all identical items or units (e.g., bottles, cans, boxes, etc.) of the same product have the same UPC symbol*, and therefore a UPC symbol cannot be used as the contest code of Claim 1. No contest organizer would use a contest code in which all contestants would receive the same code. This strange hypothetical would make all the contestants either winners or losers. Further, because the winning code is *unique to a subset* of the plurality of items produced by a manufacturer, as specified in step (1) of Claim 1, this would negate the possibility of using a UPC symbol as the contest code.

In regard to steps (3) and (4) of Claim 1, Applicants submit that step (2) of the claim specifies that the contest code is included with the item provided to the consumer. That is, the consumer already has the item. Subsequently, the consumer inputs the contest code in the prize redemption system (step (3)), and the contest code is validated (step (4)). It is respectfully submitted that the Walker et al. system allows a customer to *win* a desired product, but Walker et al. fails to teach or suggest having the customer obtain the product first and then input a contest

code from the product into the system in order to try to win the product — in Claim 1 the consumer already has the product. It follows then that Walker et al. also fails to teach or suggest validating a contest code included with a product that the customer already has.

In regard to step (5) of Claim 1, Applicants respectfully submit that Walker et al. fails to teach or suggest a contest code or a winning code, and therefore fails to disclose the step of determining whether a contest code inputted by a consumer matches a winning code.

It is well settled that in order for a prior-art reference to anticipate an invention under 35 U.S.C. § 102, “each and every element as set forth in the claim” must be found either expressly or inherently in the reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628 (Fed. Cir. 1987); MPEP § 2131. Clearly, Walker et al. fails to expressly show each and every element as set forth in Claim 1.

The Federal Circuit has held that, in order for a prior-art reference to inherently disclose an element or characteristic when the reference is silent regarding the supposedly inherent element or characteristic, extrinsic evidence may be used to “make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.” *Continental Can Co. USA v. Monsanto Co.*, 948 F.2d 1264 (Fed. Cir. 1991); MPEP § 2131.01 (III). Clearly, persons of ordinary skill would not find that Walker et al. inherently discloses each of the steps (1) through (5) of Claim 1, when the Walker et al. system has no purpose for providing contest codes to a plurality of items, in which a subset of the plurality of items has contest codes matching winning codes. As discussed above, the Walker et al. system allows a customer to play a game to try to win a product — the product is the prize itself. If the customer loses the game, the customer is not obligated to purchase the product. In stark contrast, the method of Claim 1 encourages a

consumer to obtain (*e.g.*, purchase) an item first in order to retrieve a contest code from the item. If the contest code is determined to be a winning code by the prize redemption system, then the consumer is entitled to win a prize, which need not be an item already obtained by the consumer (as would happen according to the teachings of Walker et al.) but may be anything (*e.g.*, money, vacation packages, theater tickets, etc.).

The Office Action, on pages 4-5, states:

As per claims 1-24, Walker discloses a method of and a system for providing a product to a user or consumer during an online (Internet) or offline transaction, wherein a selection of a **(promotional)** product, having a specific identification code or UPC code or identifier, is received from a customer or user including a signal or an indication (or a fee) to play a game (or to participate in a sweepstakes game). An outcome of the game, associated with the (promotional) product identification code, is determined. And if the outcome is a winning outcome, then the product is provided to the customer at no charge (the winning prize is the **promotional** product bought by the consumer) or if the outcome is a losing outcome, then the fee (paid for the entry) or a portion of it is applied to the or used to reduce the price of the **uniquely** purchased product itself. Here, the steps of selecting by a user a product having an identification code (providing a product to the consumer . . .), receiving an input from the consumer indicating his intention to participate in a game, related to the product identification code, for a prize (enabling the consumer to input the identification code into a prize redemption system and validating the identification code . . .) and determining whether the identification code is a winning code (determining the game outcome) are implicitly or explicitly supported in the current reference (See abstract; figs. 10 and 11).

(Emphasis in the original.) It appears that the Office Action is equating the selection of a product in Walker et al. to step (2) of Claim 1. If Applicants' understanding of the Office Action is correct, then Applicants respectfully disagree and submit that in Claim 1 the consumer is provided with the item that includes the contest code. That is, the consumer already has obtained the item before entering the contest. In contrast, Walker et al. teaches that the customer wants to



win the item by playing the game. As discussed above, the method of Claim 1 promotes the item by giving the consumer the opportunity to win a contest based on a contest code included with the item. That is, the consumer is encouraged to obtain (*e.g.*, purchase) the item in order to receive the contest code included with the item; the contest code included with the item enables the consumer to enter the contest. Walker et al., to the contrary, promotes the item in a different way. *The customer need not obtain the product to play the game or at any time after playing the game.* Applicants respectfully submit that a contest in which a consumer is encouraged to obtain an item and then enter a contest is not the same as a game that gives a customer a chance to win the item.

Additionally, the statement in the Office Action that various steps of the claimed invention “are implicitly or explicitly supported” in Walker et al. is respectfully submitted to be an inadequate showing of anticipation under 35 U.S.C. § 102. The requirements for a showing of anticipation are outlined above and, should the Examiner continue to assert that Walker et al. is an anticipatory reference, it is respectfully requested that the Examiner *explicitly point out, for each claimed element, the portion of Walker et al. that is believed to teach that element.*

The Office Action, on page 5, states:

Walker discloses, in general, that the customer receives the identified product for free if the outcome of the game is a winning outcome or the customer is credited the entire received fee, associated with the game entry, if the outcome is a losing outcome (or the entry fee or a portion of it may be applied or used to reduce the sales price of the identified product). This increases the attractiveness of the system to customers because a participating customer wills [*sic*] either win the product (as a prize if the outcome of the game, related to the identified code, is a winning outcome) or be no worse off than if the game was not played in the first time. Accordingly, a retailer may be willing to practice this embodiment in return for increased customer traffic and customer loyalty (col. 2: 10-62).

(Emphasis in the original.) Applicants fail to understand how the above characterization of Walker et al. is relevant to the elements of Claim 1. Applicants note that the Office Action does not identify which claim is being discussed in the quoted excerpt, and therefore interpret that it is intended to be relevant to all the claims.

Then, on pages 5-6, the Office Action states:

See col. 3: 41 to col. 4:32

Initially, in step S810 of fig. 8, a selection of a product is received from a customer. For example, in an embodiment in which the customer is physically present in a retail store, the selection is received when a customer uses a customer device, such as an in-store kiosk, a PDA or other hand-held device (including, but not limited to, a cellular telephone) in communication with the retailer controller 100 of fig. 2 via the World Wide Web or another type of network, to locate and request information regarding a **(promotional)** product. A selection may also be received once the customer uses a customer device to indicate an intent to purchase a product by **adding the product to a virtual “shopping cart”**, or once a desired product is identified by a POS terminal during customer checkout procedures, in fig. 11.

(Emphasis in the original.) Again, Applicants fail to understand how the above characterization of Walker et al. is relevant to the elements of Claim 1. Applicants note that the Office Action does not identify which claim is being discussed in the quoted excerpt, and therefore interpret that it is intended to be relevant to all the claims.

The Office Action, on page 6, states:

In an online (Internet) embodiment of step S810, a customer's initial request to access a home page of a website operated by a retailer or an indication that a web page describing the product has been viewed for a particular period of time may each be considered a selection of a product. Of course, selection of a picture or a description of a product, having an identification code, displayed on a web page of the website, addition of a product into a virtual shopping cart, or an indication of a desire to purchase a product may each be considered a received selection of a product in step S810 of fig. 8 and wherein, with the selection of an identified product, the customer can participate in a game (slot

machine type-game) for a chance to obtain or acquire the identified product for free if the outcome of the game is a winning outcome.

The product selected in step S810 may be selected from among all products offered by a retailer or from among a particular set of products identified by the retailer. **Determination of the particular set of products may be based on a purchasing history of the customer** on purchasing histories of all customers, on inventor, or on other revenue management information.

(Emphasis in the original.) Again, Applicants fail to understand how the above characterization of Walker et al. is relevant to the elements of Claim 1. Applicants note that the Office Action does not identify which claim is being discussed in the quoted excerpt, and therefore interpret that it is intended to be relevant to all the claims. The inapplicability of UPC numbers as contest codes has already been discussed above.

The Office Action at pages 6-7 states:

Additionally, a request to play a game, as mentioned above, for the selected product is received in step S820 of fig. 8. The request may be received from the customer device 200, such as a PDA (or other hand held device including a cell telephone) or a dedicated kiosk providing game functionality accordingly. **A selection of a product, having an identification code, received in step S810 may be considered a request to play a game in step S820.** In some embodiments, only those customers meeting an eligibility standard, such as a minimum customer rating 550, are eligible to play a game for products according to the invention. Therefore, step S820 may also include determination of whether the customer from whom the request was received meets the eligibility standard. The customers may also be part of a loyalty program and use identification card such as a shopper's card to participate in the promotional game (the customers may be new customers as well).

Further the game, which will be played for the selected and identified product itself is defined. In one embodiment, the type of game is initially determined based on a **selection by a customer of one of several games, or determined from among the several games based on other criteria**. These criteria may include a number of winning outcomes and a probability of each winning outcome reflected by each of the several games. The type of game may also be predetermined. In some embodiments, the type of game determined in step S830 is a game for which a probability of

a winning outcome is controllable or known, such as a slot machine game or a lottery-type game (virtual hat).

Finally, in one embodiment of step S830 of fig. 8, the selected or chosen game results in a winning outcome if the retailer controller 100 of fig. 2 **randomly selects a single white ball from a bin of black balls (random selection or random number generator)**. The bin may be a real bin or an electronic representation of a bin.

See col. 12: 65 to col. 14:30; col. 14: 62-66; figs. 10 and 11.

(Emphasis in the original.) Again, Applicants fail to understand how the above characterization of Walker et al. is relevant to the elements of Claim 1. Applicants note that the Office Action does not identify which claim is being discussed in the quoted excerpt, and therefore interpret that it is intended to be relevant to all the claims.

Applicants note that there appears to be several instances in the Office Action where there is stated or suggested some hypothetical notions of what the Walker et al. system could be modified to perform or what the Walker et al. system might be able to do, even though there is no statement or suggestion in Walker et al. itself that such hypothetical notions are contemplated. Applicants respectfully submit that the courts have long held that it is *improper* to use hindsight, based on the disclosure of the invention under examination, to reject claims by reading into the prior art features of the claimed invention that were neither disclosed nor suggested in the prior art itself. The Federal Circuit has previously addressed attempts to use hindsight reconstruction to explain away a claimed invention in a number of cases. In one such case, Interconnect Planning Corp. v. Feil, 774 F.2d 1132 (Fed. Cir. 1985), the court stated:

35 U.S.C. § 103 requires that obviousness be determined with respect to the invention as a whole. This is essential for combination inventions, for generally all combinations are of known elements. . . .When prior art references require selective combination by the court to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight gleaned from the invention itself. . . .Critical to the

analysis is an understanding of the particular results achieved by the new combination. The claims here at issue are directed to a combination of known components of telephone systems in an admittedly new way to achieve a new total system. . . . Not only must the claimed invention as a whole be evaluated, but so also must the references as a whole, so that their teachings are applied in the context of their significance to a technician at the time – a technician without our knowledge of the solution.

Although the claims were not rejected based on obviousness under 35 U.S.C. § 103, the statements in the Office Action indicate that impermissible hindsight reconstruction was used to reject the claims and therefore Applicants take this opportunity to clarify the impropriety of using hindsight analysis to find a claim to be unpatentable.

Finally, Applicants stress that the Walker et al. system allows a customer to play a game to try to win a desired product — the customer would like to own the product but *does not yet have the product*. The game does not involve a winning code included in “a subset of a plurality of items produced by a manufacturer,” as in Claim 1. Moreover, the prize for winning the game is the product itself, which would *negate* the promotional effect of having the customer obtain the product first (as in Claim 1) and then find out whether the product includes a winning code. In fact, according to Walker et al., the customer could choose *not* to purchase the product after playing the game and losing. As such, the game disclosed in Walker et al. fails to encourage a consumer to obtain (*e.g.*, buy) the promoted product through use of a contest code included with the product, and instead the game disclosed in Walker et al. merely encourages a customer to play a game with no obligation to obtain or purchase the product at any time.

Accordingly, Applicants submit that Claim 1 is not anticipated by Walker et al. and therefore respectfully request withdrawal of the rejection under 35 U.S.C. § 102(e).

Lieberman relates to a system and method for conducting a prize drawing for a game. Lieberman et al. teaches that entry forms are provided in which is depicted a product

being promoted. The entry forms include a barcode that uniquely identifies the product being promoted. Apparently, all of the same products have the same barcode, because a single centralized processing facility uses the barcode to facilitate the sorting of entry forms promoting other products identified by other barcodes. The entry form includes a space in which a contestant inserts the UPC number for the product, “which uniquely identifies the product being promoted.” The purpose of this is to encourage the contestant to “seek out, view and handle the product which is the subject of the promotion.” (See the abstract.) The winner is determined by a random drawing of entry forms corresponding to the promoted product. (See column 3, lines 24-25.)

Nothing has been found in Lieberman that is believed to teach or suggest each of the steps (1) through (5) listed above. As discussed earlier, a UPC number *cannot* be the contest code of Claim 1, because all identical items of a product have the same UPC number. Therefore, if a UPC number was used as the contest code, either all of the identical items would match the winning code or all the identical items would not match the winning code, and thus there would be no “contest.” Further, Lieberman *teaches away* from step (5), because Lieberman teaches that a winner is *randomly drawn* from entries having the correct UPC number inserted on the entry form. In contrast, Claim 1 states that in order for a consumer to be entitled to win a prize a contest code inputted by the consumer must match a winning code. Clearly, this is not a *random drawing*.

Further, Lieberman teaches no purchase is required in order to play the game (see column 4, lines 11-15). Instead Lieberman promotes a product by encouraging a consumer to “seek out, view and handle the product,” but not necessarily purchase the product. This

contradicts step (2) of Claim 1, in which the consumer is *provided with* an item that includes a contest code.

Accordingly, Applicants submit that Claim 1 is not anticipated by Lieberman and therefore respectfully request withdrawal of the rejection under 35 U.S.C. § 102(b).

Independent Claims 8, 13, and 18 include features similar to those of Claim 1 and therefore are believed to be patentable for at least the reasons discussed above. The other claims in this application depend from one or another of independent Claims 1, 8, 13, and 18 and therefore are submitted to be patentable for at least the same reasons. Because each dependent claim also is deemed to define an additional aspect of the invention, however, individual consideration or reconsideration, as the case may be, of the patentability of each claim on its own merits is respectfully requested.

Finally, the Examiner identified U.S. Patent No. 6,199,048 (Hudetz et al.) and U.S. Patent No. 5,918,214 (Perkowski) as references supporting his contention that a UPC symbol may be used as the contest code of the present invention. Applicants respectfully disagree and submit that Hudetz et al. teaches a system in which a consumer may use the UPC number of a product as a way to access information regarding the product. The system links the UPC number of the product to the URL for a Web site of the manufacturer of the product. Applicants note that Hudetz et al. states that the “UPC symbol 46 . . . uniquely identifies a particular *product* and its manufacturer. This is useful at the retail point-of-sale, where purchase of a particular *item* is recorded by scanning the item’s bar code symbol.” (Emphasis added. See col. 6, lines 28-32.) It is respectfully submitted that Hudetz et al. supports Applicants’ position that a UPC symbol uniquely identifies a *product* but is the same for identical *items or units* of the

same product. Further, Hudetz et al. does *not* show that each identical item or unit of a product carries a different UPC number, as asserted by the Examiner.

Perkowski teaches a system that allows a manufacturer to register a UPC number of a product. The system then links the UPC number with the manufacturer's URL, such that a customer may use a "Finder" to obtain information regarding a product by entering the UPC number for the product. Applicants respectfully submit that Perkowski supports Applicants' position that a UPC symbol uniquely identifies a *product* but is the same for identical *items or units* of the same product. Further, Perkowski does *not* show that each identical item or unit of a product carries a different UPC number, as asserted by the Examiner.

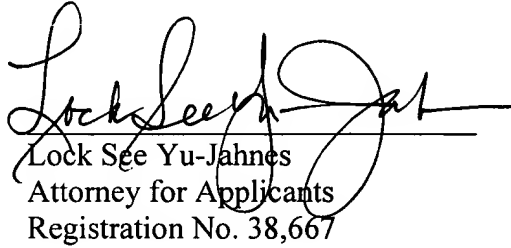
In view of the foregoing amendments and remarks, Applicants respectfully request favorable reconsideration and early passage to issue of the present application.



CONCLUSION

Applicants' undersigned attorney may be reached in our New York Office by telephone at (212) 218-2100. All correspondence should continue to be directed to our address listed below.

Respectfully submitted,

  
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